Supreme Court, U.S.
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IN THE

Supreme Court of the United States

CLUB CAR (QUEBEC) IMPORT, INC.
and MARTIN MURPHY,

Petitioners,

v.

CLUB CAR, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS PIERRE CHAMPIGNY AND ÉQUIPEMENTS PIERRE CHAMPIGNY, LTD.

JAMES W. PURCELL
Counsel of Record
AMY R. SNELL
FULCHER HAGLER LLP
520 Greene Street
P.O. Box 1477
Augusta, GA 30903-1477
(706) 724-0171

Attorneys for Respondents Pierre Champigny and Équipements Pierre Champigny, Ltd.

190586

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

CORPORATE DISCLOSURE STATEMENT PURSUANT TO RULE 29.6

Respondent Équipements Pierre Champigny, Ltd. does not have a parent corporation, and there is no publicly held company that owns 10% or more of its stock.

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INTRODUCTION

The U.S. Court of Appeals for the Eleventh Circuit properly affirmed the trial court's discretionary determination to strike portions of the damage testimony presented at trial by petitioner Club Car (Quebec) Import, Inc. ("CCQ")'s accounting expert. The accountant's testimony about CCQ's alleged lost profits, sales, and margins was misleading and unhelpful to the jury under Federal Rule of Evidence 702 because it was methodologically flawed. *Club Car, Inc. v. Club Car (Quebec) Import, Inc.*, 362 F.3d 775, 780 (11th Cir. 2004), Appendix to Petition for Writ of Certiorari ("Pet. App.") at 1a-16a, *reh. & reh. en banc denied*, __ F.3d __ (11th Cir. Jun. 29, 2004). Both the trial court's and the Eleventh Circuit's rulings are fully consistent with the trilogy of cases decided by this Court charging trial courts with a "gatekeeping" obligation, under Rule 702, to screen from the jury expert testimony that lacks reliability. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); *General Electric Co. v. Joiner*, 522 U.S. 136 (1997); *Kumho Tire Company, Ltd. v. Carmichael*, 526 U.S. 137 (1999) (sometimes referred to as the "*Daubert* trilogy.").

The hallmark of a *Daubert* inquiry is flexibility in both procedure and substance. "The inquiry envisioned by Rule 702 is, we emphasize, a flexible one." *Daubert*, 509 U.S. at 594. "The trial court must have the same kind of latitude in deciding *how* to test an expert's reliability, and to decide whether or when special briefing or other proceedings are needed to investigate reliability, as it enjoys when it decides *whether or not* that expert's relevant testimony is reliable." *Kumho Tire*, 526 U.S. at 152. Petitioner, by contrast, would have this Court reign in a trial court's discretionary authority under Rule 702 by establishing inflexible substantive and procedural "bright lines" and "procedural lines." Petition for a Writ of Certiorari

("Pet.") at 17, 18, 20. Petitioner's justification for such a radical transformation of *Daubert* principles is "clarification." Pet. at 22. Yet, the message delivered by the *Daubert* trilogy could not be more clear: "the trial judge must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable." *Kumho Tire*, 526 U.S. at 152.

COUNTER-STATEMENT OF THE CASE

Respondent Pierre Champigny is the owner and president of Respondent Équipements Pierre Champigny Ltd. ("ÉPC"). *Club Car*, 362 F.3d at 779, Pet. App. at 3a; Record ("R.") 12-161-2 to 3. ÉPC, a family business incorporated and headquartered in Quebec, Canada, is the distributor of new Club Car golf cars and parts in Quebec. ÉPC succeeded CCQ as the Quebec Club Car distributor in 2000 after Club Car decided not to offer CCQ another distributor agreement. *Club Car*, 362 F.3d 779, Pet. App. at 3a; R. 12-161-2.

Originally not parties to the lawsuit filed by Club Car against CCQ in August 2000, ÉPC and Pierre Champigny were joined to that action by CCQ in 2002 as counterclaim defendants. CCQ, as counterclaim plaintiff, sought to recover damages from ÉPC and Pierre Champigny for allegedly conspiring with Club Car to breach CCQ's distributorship contract, tortiously interfering with CCQ's business and contractual relations, defaming CCQ, and violating federal and state Racketeering Influenced and Corrupt Organizations ("RICO") statutes. R. 9-117. ÉPC and Pierre Champigny challenged the RICO claims in a summary judgment motion, which was granted by the trial court in January 2003, thus eliminating those claims from trial. R. 24-326.

The remaining claims were tried to a jury in February 2003. The trial court issued no pre-trial orders requiring *Daubert* motions to be made before trial or by a certain date. On the fourth day of trial, CCQ presented as its damages expert financial accountant Peter Ryan. Ryan testified, *inter alia*, that based upon his review of certain financial information provided by CCQ, Club Car, and ÉPC, CCQ suffered damages as a result of the actions of Club Car and ÉPC. R. 39-452-32. As pertinent to the pending petition, Ryan separated those damages into lost sales, lower margins,[1] and lost profits and placed a monetary value on each separate category of damages. *Id.* He testified about the amount of damages CCQ allegedly incurred from 1997 through the date of trial and also the amount he believed CCQ would continue to incur from the date of trial through calendar year 2005. *Id.*[2]

During his testimony, Ryan confirmed that all of the damage values he calculated for lost profits, sales, and

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1. "Margin" means gross profit. *See, e.g.*, Black's Law Dictionary 666 (abr. 6th ed. 1991) ("In commercial transactions the difference between the purchase price paid by a . . . retailer and his selling price. Also called gross profit margin.").

2. CCQ is simply incorrect, therefore, when it represents to this Court that its damages at trial "involved . . . no future damages." Pet. at 4. Ryan's testimony could not be more clear. On direct examination, he explained that the last two categories of damages he calculated were lost sales from 2002 to 2005 and lost profits from 2001 to 2005. R. 39-452-32. CCQ's distributor contract with Club Car ended in September 2000. The trial was held in February 2003. There is no question, therefore, that the damages CCQ was seeking at trial were future damages.

margins were gross numbers.[3] He admitted that he did not take into consideration any expenses whatsoever that CCQ would have incurred in generating the margins and profits. R. 39-452-94. He further admitted that he assumed that all margin or profit made by CCQ would go directly into its bank account without having to account for any expenses related to that profit or margin. *Id.* at 95-96. On the other hand, when asked how the income and loss figures on CCQ's financial statements were calculated, he readily conceded that those figures would be net numbers, "arrived at by applying generally accepted accounting principles, charging out depreciation, including expenses of the fur business and any losses arising therefrom." *Id.* at 61. CCQ's financial statements included such expenses as delivery costs, depreciation, interest, salaries, taxes, telephone services, and travel. Club Car Trial Exh. 108 at 4, R. 35-449-9 (offered), R. 41-453-63 (admitted). Thus, although "in the real world," there would many categories of expenses associated with generating profits and margins, Ryan admitted that he did not take into account any expenses in calculating CCQ's lost profits.

After Ryan completed his testimony, counsel for ÉPC and Pierre Champigny raised a *Daubert* challenge,[4] arguing

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3. "That would have been the gross margin on the sale of one year old cars for that period of time." R. 39-452-37. "I calculated the cost of these parts by reference to the pricing manual from Club Car, and then applied the gross profit on a per package basis to the number of packages that I previously calculated." *Id.* at 39. "I testified previously that I had calculated damages at a gross margin number." "I already said its at a gross level." *Id.* at 99.

4. This objection was actually the third of three times that the *Daubert* challenge was made during trial. Immediately after CCQ

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that Ryan's testimony was fundamentally and economically flawed and lacking in reliability and helpfulness to the jury because his damage calculations failed to take into consideration any costs or expenses involved in generating profits, sales, and margins.[5] The trial court agreed that Ryan's

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called Ryan to the witness stand, counsel for Club Car asked for a hearing outside the presence of the jury. At side bar, counsel requested the trial court to exercise its "gatekeeping function," but the trial court declined to do so at that time, stating "you should have called my attention to it long before." R. 39-452-13. After Ryan's voir dire as to qualifications, Ryan's testimony was again challenged, this time on the basis of his qualifications. The trial court ultimately rejected this challenge as untimely and ruled "I am going to let him testify over your objection." *Id.* at 25. At the conclusion of Ryan's direct examination, cross-examination, and re-direct examination, counsel for ÉPC and Pierre Champigny reasserted the *Daubert* objection because *Daubert* and Rule 702 of the Federal Rules of Evidence so clearly forbid a jury from considering the unreliable and unhelpful lost profits testimony given by Ryan. The trial court, however, deferred argument on that reasserted objection until after the jury had been excused for the day so as to make the most efficient use of the jury's time. *Id.* at 114-15. By the time the trial court heard argument on the *Daubert* objection, the parties had all rested. *Id.* at 211-22. Thus, it is simply not correct, as CCQ maintains, that the *Daubert* challenge was held back until "after the close of evidence." Pet. at 12.

5. Under Georgia law applicable to this diversity action, the formula for computing lost profits is clear: "the gross amount minus expenses equals the amount of recovery." *Shaw v. Ruiz*, 207 Ga. App. 299, 304, 428 S.E.2d 98, 99 (1993). The plaintiff seeking lost profits must "show the probable gain with great specificity as well as expenses incurred in realizing such profits." *Id.* It is not possible to reasonably compute lost profits without taking into consideration the expenses incurred in generating those profits. *Complete Concepts, Ltd. v. General Handbag Corp.*, 880 F.2d 382, 392 (11th Cir. 1989).

failure to factor in any expenses whatsoever to his lost profit calculations "denigrates the value of his opinion," even without another expert coming in and saying as much. In effect, Ryan undermined his own opinion by his candid admissions that he failed to account at all for costs and expenses. R. 39-452-211 to 22. Before the case was given to the jury for its deliberation, the trial court instructed the jury to disregard any of Ryan's testimony where he failed to factor in costs or expenses. *Id.* at 222. With the exception of that stricken testimony, however, the jury was at liberty to consider any other testimony given by Ryan in its determination of CCQ's damages.[6]

Prior to the *Daubert* hearing, counsel for ÉPC and Pierre Champigny had handed the court clerk a copy from a page out of the Reference Manual on Scientific Evidence, from the chapter entitled "Reference Guide on Estimation of Economic Losses in Damages Award." When counsel for ÉPC and Pierre Champigny attempted to discuss this excerpt with the court, however, CCQ's counsel complained that the excerpt was not properly served on him. *Id.* at 216-17. CCQ labels this submission an *ex parte* communication. In reality, there was nothing at all *ex parte* about this submission. Counsel for ÉPC and Pierre Champigny had placed it on the tables of CCQ and Club Car in the courtroom before the *Daubert* hearing, *id.* at 217, a point later confirmed at a post-trial motion hearing, at which time Club Car's counsel confirmed that he had witnessed this service and CCQ's counsel conceded as much: "If [counsel for ÉPC and Pierre Champigny] says he laid it on the table, I am not going to stand here and argue with that, that he laid it on the table, because I believe what he said." R. 42-461-18.

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6. Once again, therefore, CCQ's petition misrepresents the factual record when it states that "the trial court struck Ryan's expert opinion evidence on damages *in its entirety*." Pet. at 13.

More importantly, however, the submission was not a "communication" at all. "Communication" implies that there was a sharing of information with the court. There was no such sharing of information, however, because, as the trial court clearly stated on the record during trial, it had not even seen the excerpt before making its *Daubert* ruling. R. 39-452-222. CCQ's petition fails to mention this point, even though it was part of the Eleventh Circuit's ruling affirming the trial court's *Daubert* determination: "the trial court indicated he had not even seen the excerpt when it made its ruling." *Club Car*, 362 F.3d at 781, Pet. App. at 6a.

At the conclusion of the five-day trial, the jury found in favor of both ÉPC and Pierre Champigny as to liability and, accordingly, awarded CCQ no damages on its counterclaims against either ÉPC or Pierre Champigny. *Club Car*, 362 F.3d at 779-80, Pet. App. at 4a; R. 41-453-70.

After the trial court denied CCQ's post-trial motions for new trial and for judgment as a matter of law, CCQ appealed. The Eleventh Circuit, applying *Joiner*'s deferential eye, affirmed the *Daubert* ruling, both in substance and as a matter of procedure. Substantively, the Eleventh Circuit noted that Ryan's testimony failed to comport with Georgia law requiring that his lost profit calculations factor in expenses normally incurred in generating sales and income. Ryan himself testified that he had not factored in any expenses whatsoever into his lost profit calculations although in the real world he would have done so. Thus, Ryan's testimony ran obviously afoul of the "general acceptance" factor identified in *Daubert*. *See Daubert*, 509 U.S. at 593-94 (degree to which experts in the field accept technique relevant

to admissibility).[7] *Club Car*, 362 F.3d at 780, Pet. App. at 5a.

CCQ's procedural challenges fared no better. The Eleventh Circuit properly determined that the trial court's procedures conformed to the *Daubert* trilogy because the court had permitted extensive voir dire and cross-examination of Ryan and heard lengthy argument on Ryan's methodology before striking the testimony as misleading. *Club Car*, 362 F.3d at 780-81, Pet. App. at 6a. Heeding this Court's directive that a trial court must have "broad discretion in determining how to perform its gatekeeper function," the Eleventh Circuit refused to reverse based on the timing of the *Daubert* challenge, noting that "nothing prohibits [a trial court] from hearing a *Daubert* motion during trial." *Club Car*, 362 F.3d at 780, Pet. App. at 6a. Because there was an adequately developed record from which the trial court could make its Rule 702 determination, the Eleventh Circuit found that the trial court's exercise of its discretion was soundly within the flexible procedural boundaries established by the *Daubert* trilogy. *Club Car*, 362 F.3d at 780-81, Pet. App. at 6a.

REASONS FOR DENYING THE PETITION

The writ must be denied as to Respondents ÉPC and Pierre Champigny because the trial court's Rule 702 determination excluding Ryan's lost profits testimony cannot cross the harmless error threshold as to these Respondents.

7. Affirming on this basis, the Eleventh Circuit did not reach, nor did it need to reach, any other rationales articulated by the trial court in its Order denying CCQ's post-trial motions for new trial and for judgment as a matter of law. Ryan's failure to conform his testimony to generally accepted accounting principles, by itself, was more than sufficient rationale for the Eleventh Circuit to affirm the trial court ruling.

The jury found that neither ÉPC nor Pierre Champigny were liable to CCQ and awarded CCQ no damages against ÉPC and Pierre Champigny. Therefore, even assuming the trial court's ruling somehow contravened the *Daubert* trilogy – which it did not – that ruling had no effect on the jury's verdict in favor of ÉPC and Pierre Champigny.

The trial court's *Daubert* assessment fully comported with the directives of this Court in the *Daubert* trilogy. CCQ's arguments, distilled to their essence, boil down to nothing more than a disagreement with the way the Eleventh Circuit decided the appeal. Pet. at 15 ("The Eleventh Circuit must be reversed for the legal error in excluding the expert. . . ."). CCQ tries to paint this case as one of a trial court run amok, Pet. at 19 ("The predictable result . . . is the slipshod analysis and shoddy procedure demonstrated [by the trial court] in the instant case, ..."), and a court of appeals that totally abdicated its judicial responsibility, Pet. at 22 ("the Eleventh Circuit opinion in the instant case, above all, must not become the bellwether for 'anything goes' in *Daubert* admissibility determinations. . . ."). CCQ conjures up many dire policy justifications for granting the writ and concludes that this Court must exercise supervisory power over the Eleventh Circuit because that Court allegedly sanctioned egregious departures from the accepted and usual course of judicial proceedings. This Court should reject petitioner's invitation to second-guess a trial court and court of appeals that properly applied *Daubert* and its progeny.[8]

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8. Yet other reasons to deny the writ are CCQ's utter disregard of this Court's rules and flagrant misrepresentations contained in papers it filed with this Court. Under Supreme Court Rule 29.5, when CCQ filed its petition, it was also required to file a proof of service containing a statement that all parties required to be served "have

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I. Any Alleged Error in the Exclusion of Ryan's Damage Testimony Was Harmless as to Respondents Équipements Pierre Champigny, Ltd. and Pierre Champigny Because the Jury Found No Liability on The Part of These Respondents

As its conclusion, CCQ requests that "the petition for writ of certiorari . . . be granted and the judgment below reversed." Pet. at 23. Over sixty years ago, this Court held that "[h]e who seeks to have a judgment set aside because of an erroneous ruling carries the burden of showing that prejudice resulted." *Palmer v. Hoffman*, 318 U.S. 109 (1943). CCQ cannot carry the burden of showing that reversal of the judgment is justified as to Respondents ÉPC and Pierre Champigny, however.

By its own admission, CCQ is seeking a new trial only as to damages. Despite the breadth of the concluding sentence of the petition, all of the questions raised by CCQ focus on the trial court's ruling striking Ryan's lost profits testimony. Quelling any doubt about what it hopes to accomplish here, CCQ admits that "unlike many *Daubert* cases, the exclusion of the expert did not affect the liability determination." Pet. at 7. Thus, in the section of the petition denominated "What is Sought," CCQ asserts that "[t]his case should be

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been served." According to this Court's docket entries, CCQ filed its petition on September 27, 2004. The proof of service filed with the petition contains the statement that "I hereby certify that I am this day serving . . . 3 copies . . . by first-class mail" and is dated September 27, 2004. Attached as an appendix to this brief in opposition is a copy of the envelope received by counsel for ÉPC and Pierre Champigny containing their services copies. The envelope is post-marked September 29, 2004, two days ***later*** than the date that CCQ certified to this Court as the date on which it served its petition under Rule 29.5.

remanded with instructions to assess damages according to the improperly excluded expert damages evidence." Pet. at 4.

The jury, however, did not award CCQ any damages as to Respondents ÉPC and Pierre Champigny because the jury found in their favor as to liability. Thus, as to ÉPC and Pierre Champigny, even assuming error in the trial court's *Daubert* ruling, such alleged error cannot cross the threshold of harmless error contained in Federal Rule of Evidence 103(a) ("Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected."), Federal Rule of Civil Procedure 61 (error in excluding evidence not ground for new trial or vacating judgment unless refusal to take such action appears to court inconsistent with substantial justice) and 28 U.S.C. § 2111 ("On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."). *See also United States v. Borden Co.*, 347 U.S. 514, 516 (1954):

> [W]e are of the opinion that, even assuming error in each of the challenged rulings, it does not appear that admission of the evidence in question would have been sufficient to change the [outcome of the trial] . . . hence the rulings cannot be said to have affected substantial rights of the parties within the meaning of 28 U.S.C. § 2111.

In this case, even if the trial court had allowed the jury to consider all of Ryan's damage testimony, that determination would not have changed the jury's verdict of no liability as to ÉPC and Pierre Champigny. Accordingly,

CCQ cannot carry its burden of showing that prejudice resulted and is not entitled to reversal of the judgment in favor of ÉPC and Pierre Champigny.

II. The Eleventh Circuit's Ruling, Affirming the Trial Court's Discretionary Determination to Exclude Ryan's Damage Testimony Because Such Testimony Was Based on Flawed Methodology That Was Unaccepted in the Accounting Community, Fully Comported With the *Daubert* Trilogy

A. The Factors Considered by the Trial Court in its *Daubert* Assessment Were Relevant and Fit the Facts and Issues of the Case

CCQ maintains that the trial court's *Daubert* assessment was flawed because it was not based on "germane factors" and, therefore, failed to fit the facts of the case. In point of truth, however, as the record fully bears out, the factors relied on by the trial court, and sanctioned by the Eleventh Circuit, came straight out of *Daubert*.

As noted, CCQ was seeking damages in the form of lost profits. Under Georgia law, the formula for computing lost profits is "the gross amount minus expenses." *See supra* note 5. When Ryan calculated CCQ's damage figures, he failed to deduct any expenses whatsoever. He admitted, though, that when calculating profit and loss statements, he would use generally accepted accounting principles and charge out costs and expenses incurred in making any profits. The trial court ruled that Ryan, by his own testimony, therefore, destroyed the validity of his opinion. R. 39-452-218. The Eleventh Circuit's ruling mirrored that of the trial court: "Ryan['s estimate of CCQ's damages] was based on

gross sales and gross profit figures. Ryan admitted he had not factored in expenses CCQ would normally incur in generating income and sales." *Club Car*, 362 F.3d at 780, Pet. App. at 5a. Therefore, "[Ryan's] lost profit calculation was based on flawed methodology that was unaccepted in the accounting community. *See Daubert*, 509 U.S. at 593-94 (degree to which experts in the field accept technique relevant to admissibility)." *Club Car*, 362 F.3d at 779, Pet. App. at 5a.

CCQ also makes much in its petition of several additional factors cited by the trial court in its post-trial Order denying CCQ's motions for new trial and for judgment notwithstanding the verdict: failure to reduce to present value, failure to adjust for inflation, and revenues CCQ would have earned despite Club Car's alleged misconduct. Pet. at 11-12. CCQ asserts these factors all relate to future damages, which it was not seeking at trial, and therefore the trial court's use of these factors in its post-trial order was irrelevant and failed to fit the facts of the case. Putting aside CCQ's factual misstatement that it was not seeking future damages at trial, *see supra* note 2, the fundamental flaw in CCQ's argument on this point is that the Eleventh Circuit affirmed the trial court's *Daubert* ruling solely on the basis that Ryan's testimony failed to conform to generally accepted accounting principles, as noted above, *supra* note 7. The other factors cited by the trial court in its post-trial motion, which were fully supported by the trial record, did not enter into the Eleventh Circuit's analysis. Therefore, the Eleventh Circuit did not countenance the trial court's alleged "failure to consider relevant factors," as CCQ maintains.

CCQ also condemns both the trial court and the Eleventh Circuit for not considering Ryan's explanation about why he

did not deduct additional costs. Pet. at 14. When Ryan gave such an explanation, however, he was discussing an entirely different element of damages than lost profits: e.g., his evaluation of the value of CCQ should it be sold to another company. R. 39-452-55, 57, 108. Ryan testified that in a sale of the business, "the amount of incremental administrative expenses would be minimal." *Id.* at 108. His explanation about not deducting costs, therefore, is unrelated to his prior testimony about lost profits and was properly not part of the reasoning employed by the Eleventh Circuit in affirming the trial court.

CCQ also faults the trial court for failing to articulate exactly what costs Ryan should have deducted from his lost profits calculations. Pet. at 13-14. This argument is specious. As noted, the trial record contains evidence as to the costs and expenses that would normally be considered in calculating profits and losses, but Ryan admitted he ignored all of these expenses when he calculated CCQ's alleged lost profits. Because Ryan failed to factor any costs whatsoever into his lost profits calculations, it was not necessary for the trial court to "spell out" with any more specificity the methodological shortcomings of Ryan's damage testimony.

CCQ also maintains that the Eleventh Circuit's ruling must be reversed because it is "contrary to the precedent of this court in *Bazemore v. Friday*," 478 U.S. 385 (1986). Pet. at 15. *Bazemore* is a Title VII case decided by this Court seven years before *Daubert*. The plaintiffs in that case alleged that the North Carolina Agricultural Extension Service had engaged in a pattern and practice of racial discrimination. They presented expert statistical evidence as proof of discrimination. The trial court rejected this evidence because the expert had not included a number of variable factors the

court considered relevant, including pay increases that varied from county to county. The U.S. Court of Appeals for the Fourth Circuit reversed. This Court, however, found the regression analysis admissible, despite the omission of certain variables. *Id.* at 400 ("While the omission of variables from a regression analysis may render the analysis less probative than it otherwise might be, it can hardly be said, absent some other infirmity, that an analysis which accounts for the major factors, 'must be considered unacceptable as evidence of discrimination.'"). *Bazemore* is hardly precedential authority for reversal of the Eleventh Circuit's ruling in this case. *Bazemore* does not stand for the proposition that "failure to consider all ***cost*** variables goes to probativeness, not admissibility," as CCQ represents. Pet. at 14 n.19 (emphasis added). *Bazemore* does not refer to ***cost*** variables at all. *Bazemore* does not speak to the admissibility of expert testimony under Rule 702 of the Federal Rules of Evidence or *Daubert*. It does not even speak to damage evidence. It is both factually and legally inapplicable to this case. Therefore, *Bazemore* provides absolutely no basis for concluding that the Eleventh Circuit sanctioned any departure by the trial court of the usual and accepted course of judicial proceedings.

In short, far from staying outside the evidentiary boundaries set by the *Daubert* trilogy, as CCQ proposes, both the trial court and the Eleventh Circuit hewed diligently to *Daubert* by resolving the admissibility issue based on factors that come straight out of *Daubert*. The lower court rulings, therefore, could not have been more relevant nor more tied to the facts of this case.

B. The Trial Court's *Daubert* Ruling Was Fully Supported by the Evidence and Legal Authority

CCQ accuses the trial court of making an "off-the cuff" *Daubert* ruling, without any evidentiary or legal support, and proposes a number of "bright line" tests that are allegedly necessary to curb abusive trial practices. In reality, however, the trial court had ample evidence and legal authority from which to conclude that Ryan's lost profit testimony should be stricken. The "bright line" tests suggested by CCQ would serve only to destroy the flexibility that is the hallmark of the *Daubert* assessment.

One bright line test suggested by CCQ is that no trial court ever be permitted to strike an expert's testimony unless there is testimony from an opposing expert. No such opposing testimony was required in this case, however. As the trial court noted, Ryan himself provided evidence of the unreliability of his methodology when he testified he did not take into consideration costs or expenses but would have done so if calculating lost profits using generally accepted accounting principles. The trial court did not need to hear testimony from an opposing expert to conclude that Ryan's testimony was methodologically flawed. Ryan's lost profit calculations imploded on the weight of their own shortcomings. In *Kumho Tire*, this Court limited its inquiry to virtually the same evidence – testimony of plaintiff's expert – when it decided that the trial court properly excluded the testimony under *Daubert* and Rule 702. *Kumho Tire*, 526 U.S. at 154 ("the transcripts of Carlson's depositions support both the trial court's initial uncertainty and its final conclusion. Those transcripts cast considerable doubt upon the reliability of both the explicit theory . . . and the implicit proposition. . . ."). CCQ's invitation to this Court to impose

as a bright line test that no trial court ever exclude expert testimony unless an opposing expert offers contrary testimony is legally at odds with the *Daubert* trilogy and unnecessarily restrictive.

Similarly flawed is CCQ's argument for yet another bright line test: "that legal authority not properly before the court is inexcusable and cannot be, or even appear to be, a basis for exclusion." Pet. at 18 n.25. CCQ faults the trial court for allegedly basing its *Daubert* determination on the so-called *ex parte* communication noted above and faults the Eleventh Circuit for not realizing the importance of that event. Pet. at 16-17. Even if the page from the Reference Manual had not been properly served on CCQ's counsel (a point never established by CCQ and which Respondents deny, as noted previously), that legal authority had absolutely no impact on either the trial court's ruling or the Eleventh Circuit's affirmance because, as noted, the trial court never read it before it made its *Daubert* ruling. R. 39-452-222; *Club Car*, 362 F.3d at 781, Pet. App. at 6a.[9] It is hardly surprising, therefore, that the Eleventh Circuit may have "dismissed the importance" of the alleged *ex parte* communication, as CCQ suggests. For these reasons, there is no justification for applying any "bright line" test about the legal support that must be before a trial court for it to make its *Daubert* determination.

In the final analysis, therefore, CCQ has offered no cogent reasons for curtailing the "considerable leeway" accorded to trial courts in carrying out their "gatekeeping

9. Thus, there is absolutely no factual support for CCQ's statement that the trial court's "ruling turn[ed] on" the page from the Reference Manual. Pet. at 17 n.24. A ruling cannot possibly "turn on" a document never read by the court.

obligation" or for establishing "bright line" tests that would only create meaningless constraints on a trial court's Rule 702 authority.

C. The Trial Court's Rationale for its *Daubert* Ruling Was Enunciated Concurrently With Its *Daubert* Ruling

CCQ posits that the trial court ruling is infirm because it was supported by an after-the-fact justification in an order denying CCQ's post-trial motions for new trial and for judgment as a matter of law. Pet. at 18. As the record fully substantiates, however, the trial court's rationale – Ryan's failure to consider costs and expenses in his lost profit calculations – was announced at trial at the very time that the trial court rendered its *Daubert* ruling. Although the trial court may have elaborated on the evidentiary basis for the ruling in its post-trial order, based on evidence presented at trial, the Eleventh Circuit's affirmance was based only on the rationale given by the trial court at trial. Therefore, there were no "post facto justifications" of the trial court's *Daubert* assessment in this case, as CCQ states.

Because the trial court's ruling was made during the course of trial, CCQ had an opportunity to test the trial court's reasoning, present facts and argument supporting the grounds for admission of Ryan's testimony, and explain why, under *Daubert* and its progeny, the trial court was making an erroneous ruling. No "extreme dangers" are suggested by the manner in which the trial court voiced its *Daubert* assessment in this case. No "inherent dangers" lurk in the shadows for this Court to dispel. To the contrary, the manner in which the trial court announced its *Daubert* ruling gave CCQ the very opportunity it

says it deserved to test that ruling through the "adversarial process." Nothing more was or should be required under the *Daubert* trilogy.

D. The Trial Court Had Broad Discretion to Allow a *Daubert* Challenge at Trial

Yet another "bright line" test urged by CCQ is that *Daubert* challenges be raised before trial in a motion *in limine* and only rarely, if sufficient justification exists, entertained at trial. Pet. at 20-21. Imposing such a test, however, would be a big step backward from the *Daubert* trilogy.

In *Kumho Tire*, this Court refused to impose a bright line laundry list of the factors to be assessed by a trial court in its *Daubert* determination because "[t]oo much depends upon the particular circumstances of the particular case at issue." *Kumho Tire*, 526 U.S. at 150. Because a *Daubert* assessment requires a case-specific, individualized inquiry about the relevance and reliability of an expert's testimony, "[t]he trial court must have the same kind of latitude in deciding *how* to test an expert's reliability, . . . as it enjoys when it decides *whether or not* that expert's relevant testimony is reliable." *Kumho Tire*, 526 U.S. at 152. The rationale for the Court's disinclination to set down any bright line procedural standards governing a trial court's *Daubert* assessment was that "the Rules seek to avoid 'unjustifiable expense and delay' as part of their search for 'truth' and the 'jus[t]determin[ation]' of proceedings." *Kumho Tire*, 526 U.S. at 152-53.

Thus, as reflected by the Advisory Committee's note to the 2000 amendments to Rule 702:

> The amendment makes no attempt to set forth procedural requirements for exercising the trial

> court's gatekeeping function over expert testimony. See Daniel J. Capra, *The Daubert Puzzle*, 38 Ga.L.Rev. 699, 766 (1998) ("Trial courts should be allowed substantial discretion in dealing with *Daubert* questions; any attempt to codify procedures will likely give rise to unnecessary changes in practice and create difficult questions for appellate review."). Courts have shown considerable ingenuity and flexibility in considering challenges to expert testimony under *Daubert*, and it is contemplated that this will continue under the amended Rule (citations omitted).

This commentary reflects *Daubert*'s confidence that "federal judges possess the capacity to undertake this review," 509 U.S. at 593, without the necessity of imposing strict guidelines on how to undertake the review. Thus, *Daubert* objections can properly be raised following a deposition, in conjunction with a motion for summary judgment, in a pre-trial motion *in limine*, or at trial. The challenge can be oral or written. A trial court can resolve the objection by requiring separate briefing, by holding a hearing, or by listening to the testimony at trial and then making a ruling. The procedure employed will necessarily depend on the facts of each individual case. Federal courts throughout the country have utilized a number of different procedures to carry out their "gatekeeping obligation." *See, e.g.*, Manual for Complex Litigation-Fourth §§ 23.352, 23.353 (2004). None of these approaches are abusive under *Daubert* or call for strict guidelines, as argued by CCQ.[10]

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10. CCQ posits *Goebel v. Denver and Rio Grande Western R.R. Co.*, 215 F.3d 1083 (10th Cir. 2000), as an allegedly factually similar case because "the defendant [in *Goebel*] missed the motion in limine (Cont'd)

This case is an example of why trial judges need considerable procedural flexibility in exercising their gatekeeping function. As noted, the trial court initially rejected the *Daubert* challenge as too late, which the court had broad discretion to do. What the court did not have discretion to do, however, was to refuse to exercise its *Daubert* responsibility at all. *See, e.g., Kumho Tire*, 526 U.S. at 158-59 (Scalia, J., concurring) (trial court discretion in choosing manner of testing expert reliability "is not discretion to abandon the gatekeeping function."). Thus, after Ryan testified and it became crystal clear that his lost profits testimony contravened *Daubert*'s general acceptance factor, the challenge was re-asserted, and the trial court, obviously concerned about the methodological deficiencies of Ryan's lost profits testimony, properly heard argument on that challenge and properly struck the lost profits testimony as unreliable and unhelpful.

The procedure employed by the trial court in striking Ryan's lost profits testimony is not unlike the process scientists undertake in their scientific endeavors, as noted by this Court in *Daubert*: "In the endless process of testing

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(Cont'd)
deadline and moved to strike the expert after the plaintiff rested." Pet. at 20. In reality, however, the defendant in *Goebel* challenged the opposing expert on three separate occasions: in a motion in limine, when the witness was called to testify during trial, and in a post-trial motion for judgment as a matter of law. The trial judge rejected the challenge and admitted the expert testimony. Unlike this case, the trial judge in *Goebel* had denied the challenge without making any findings whatsoever. Therefore, the Tenth Circuit found an abuse of discretion because of the lack of any findings in the record to support the admission of the evidence, not because of the timing of the challenge.

and retesting, there is a constant rejection of the dross and a constant retention of whatever is pure and sound and fine." *Daubert*, 509 U.S. at 597 n.13 (citing B. Cardozo, The Nature of the Judicial Process 178, 179 (1921)). In this case, the trial court's *Daubert* ruling properly removed the "dross" from the jury's consideration and left intact any part of his testimony that was "pure and sound and fine." There was nothing abusive or improper about how or when the trial court reached its *Daubert* determination. The bright line sought by CCQ as to the timing of a *Daubert* challenge would serve no purpose other than to eliminate, without any reason for doing so, the flexible procedural boundaries established by the *Daubert* trilogy.

E. Ryan's Lost Profits Testimony Was Not Excluded on the Basis of Ryan's Deficient Qualifications

CCQ's final challenge can be disposed of in short shrift. CCQ complains that the trial court wrongfully excluded Ryan's damage testimony based on his qualifications, or lack thereof, and that the Eleventh Circuit ignored this alleged reversible error. Pet. at 21. As the record fully bears out, however, the basis for the trial court's exclusion of Ryan's testimony was his flawed methodology, not his paltry qualifications.

Although the trial court was originally inclined to exclude Ryan's testimony because he had never testified as an expert on economic damages before and had no experience evaluating the type of damages about which his testimony concerned, R. 39-452-23, the Court reconsidered, after CCQ's strenuous entreaties, and allowed Ryan to give expert testimony despite his marginal qualifications, *id.* at 25. Despite the objections of Club Car, ÉPC, and Pierre Champigny that Ryan was unqualified, the Court held, "I am going to let him testify over your objection." *Id.*

As is evidenced by the record, Ryan's testimony was not excluded because of his qualifications. Therefore, despite CCQ's efforts to elevate the court's qualification ruling to an undeserved matter of prominence, it is hardly surprising that the Eleventh Circuit never addressed this issue.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

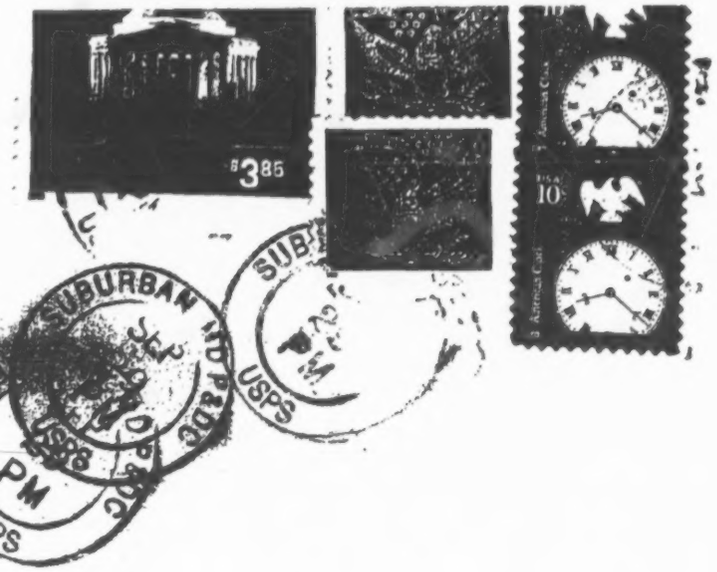
Respectfully submitted,

JAMES W. PURCELL
Counsel of Record
AMY R. SNELL
FULCHER HAGLER LLP
520 Greene Street
P.O. Box 1477
Augusta, GA 30903-1477
(706) 724-0171

Attorneys for Respondents Pierre Champigny and Équipements Pierre Champigny, Ltd.

APPENDIX

PHOTOCOPY OF ENVELOPE FROM CCQ



Curry & Taylor
1330 New Hampshire Avenue
Suite 124
Washington, DC 20036

Amy R. Snell
Fulcher, Hagler, Reed, et al
520 GREENE ST
AUGUSTA, GA 30901-1404

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